MOTION FILED APR 26 1954

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

No. 464

UNITED STATES OF AMERICA,
Appellant,

vs.

THE BORDEN COMPANY, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

MOTION FOR LEAVE TO FILE A BRIEF ON BEHALF OF DEAN MILK COMPANY AS AMICUS CURIAE.

THOMAS C. MCCONNELL,
Attorney for Dean Milk Company.

THE BUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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MOTION FOR LEAVE TO FILE A BRIEF ON BEHALF OF DEAN MILK COMPANY AS AMICUS CURIAE.

Now comes Dean Milk Company, a corporation, by Thomas C. McConnell, its attorney, and asks leave of this Court to filed instanter a brief as *amicus curiae* in the instant case, and for cause shows:

This is a suit brought by the Government under Sections 1 and 2 of the Sherman Act (15 U. S. C. A. Sections 1 and 2) and under Section 2(a) of the Clayton Act as amended (15 U. S. C. A. Section 13(a)) to enjoin a conspiracy to monopolize trade and commerce in the sale of fluid milk to wholesale customers and certain public institutions in the

Chicago area, and to prevent discrimination in the price of sales of said fluid milk.

Movant, Dean Milk Company, obtained on December 3, 1952, the entry of a decree by the Honorable Michael L. Igoe, Judge of the District Court of the United States for the Northern District of Illinois, Eastern Division, enjoining among others the Bowman and Borden dairies from certain acts therein designated in the sale of fluid milk in the Chicago area. Said case is docketed as "*Dean Milk Company* v. *American Processing and Sales Company, Inc., a corporation, et al.,*" No. 49 C 1159.

In the decision of the instant case the trial court in referring to the above decree stated (111 F. Supp. 562, 581-2):

> "A decree of this court entered at the instance of a private litigant is as binding upon a defendant as a decree entered at the instance of the government; and a consent decree, entered by any judge of this court without hearing evidence, is as binding as a decree entered by another judge after a protracted trial. I conclude, therefore, that each of the remaining defendants is now effectively enjoined by this court from performing any of the acts set forth in the government's prayer for injunctive relief, insofar as the Clayton Act is concerned.
>
> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.
>
> "For the foregoing reasons, the motions of defendants Bowman, Borden, Ridgeview, and Belmont to dismiss that part of the complaint which alleges violations of Section 2(a) of the Clayton Act must be granted."

It is submitted that the effect of these remarks by the trial court is to place upon a private litigant, Dean Milk

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Company, the burden of policing the entire milk industry in Chicago. Movant has neither expressly nor impliedly assumed such a burden, and for the reasons set forth in the accompanying brief does not wish to do so, and therefore asks leave to file herewith a brief as *amicus curiae* asking that the decision of the trial court in so far as it states "And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations" be reversed by the opinion of this Court.

Respectfully submitted,

DEAN MILK COMPANY, a corporation,

By THOMAS C. MCCONNELL,
Its attorney.

Dated: Chicago, Illinois,
April 23, 1954.

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UNITED STATES OF AMERICA,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS.

MEMORANDUM OF DEAN MILK COMPANY AS AMICUS CURIAE.

This is a suit brought by the Government under Sections 1 and 2 of the Sherman Act (15 U. S. C. A. Sections 1 and 2) and under Section 2(a) of the Clayton Act as amended (15 U. S. C. A. Section 13(a)) to enjoin a conspiracy to monopolize trade and commerce in the sale of fluid milk to wholesale customers and certain public institutions in the Chicago area and to prevent discrimination in the price of sales of said fluid milk.

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District of Illinois, Eastern Division, enjoining among others the Bowman and Borden dairies from certain acts therein designated in the sale of fluid milk in the Chicago area. Said cause is docketed as *"Dean Milk Company* v. *American Processing and Sales Company, Inc., a corporation, et al.,"* No. 49 C 1159.

In the decision of the instant case, the trial court stated (111 F. Supp. 562, 581-2):

> "Thus, the terms of Section VII of the Dean decree clearly enjoin Bowman, Borden, Ridgeview and Belmont from performing all acts which the government has specified in paragraph 10 of its prayer for relief.
> * * *
>
> "As a court of equity, I will not perform a useless task. The violations of the Clayton Act described in the complaint and shown at the trial are, for the most part, old violations. And to this court, the Dean decree assures, as completely as any decree can assure, that there will be no new violations.
>
> "For the foregoing reasons, the motions of defendants Bowman, Borden, Ridgeview, and Belmont to dismiss that part of the complaint which alleges violations of Section 2(a) of the Clayton Act must be granted."

We submit that the effect of these remarks by the trial court is to place upon a private litigant the burden of policing the entire milk industry in the City of Chicago.

The attorney for Dean Milk Company is also attorney for the plaintiffs in the case of *Bigelow, et al.* v. *RKO Radio Pictures, Inc., et al.,* a case which has previously been here for review. In that case, on an appeal to the Court of Appeals for the Seventh Circuit on one aspect of the injunction decree entered therein, the reviewing court took occasion to criticize the plaintiffs for undertaking to police the motion picture industry pursuant to the District Court's decree. The remarks of the Court of Appeals are contained in the volume of reports designated as 199 F. 2d 794, at page 797, and are as follows:

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"* * * It appears from the argument of counsel for appellees that while he insists that he represents only the owners of the Jackson Park Theatre, nevertheless he emphasizes the beneficent effects of the decree on other independents, stressing the improvement of the condition of competition in the Loop as well as in the outlying areas—thus indicating that he does conceive his position as one of policeman for the industry. * * *

"As we have previously indicated, it appears to us to be an unhealthy condition for one independent theatre to be, in effect, policing the industry for this entire area."

While we do not agree that the policing of the motion picture business is "unhealthy", we do wish to point out that we know from personal experience that it is beyond the financial means of any one litigant and beyond the physical strength and time resources of any one lawyer to police an industry *pro bono publico*. Obviously, it was never intended by the Congress that the efforts of a private litigant should entirely supersede the duties of the Department of Justice in policing an industry.

We submit that the position of the trial court is unfair to the private litigant and to the public interests so manifestly involved.

We submit that the decision on this issue is clearly in error and, because of the large questions of public policy and public interest involved, should be reversed by this Court.

If the present opinion is permitted to stand, then no Government injunction decree is possible where a private litigant has obtained an injunction concerning the same subject matter, and this on the trial court's theory that it would be performing "a useless task".

We submit that if the Congress had thought the task was useless it would not have granted rights to an injunc-

tion to both the Government and to the private litigant covering the same violations of law.

There is also danger in permitting the present opinion to stand in that it furnishes a basis for arguing the converse; namely, that no private decree of injunction should be entered where a Government decree has been obtained. This is a particularly dangerous doctrine in view of the penchant of anti-trust defendants to argue that a consent decree obtained from the Government disposes of all issues raised in private litigation concerning the same subject matter.

The effect of the present opinion obviously destroys rights and remedies granted the United States Government by the Congress and imposes upon a private litigant burdens in the public interest which the Congress itself never assumed to impose.

We therefore most respectfully submit that the decree entered by the District Court should be reversed.

Respectfully submitted,

THOMAS C. MCCONNELL,
Attorney for Dean Milk Company, a corporation.

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